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PREPARATORY COMMITTEE ON THE ESTABLISHMENT
OF AN INTERNATIONAL CRIMINAL COURT
12-30 August 1996

DRAFT REPORT OF THE PREPARATORY COMMITTEE

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Chapter III

A. Establishment of the Court and the relationship between the Court and the United Nations

1. The issues on which the debate focused were the following: status and nature of the Court and method of its establishment; relationship between the Court and the United Nations; and financing of the Court.

1. Status and nature of the Court and method of its establishment

2. There was general support for the view that the Court should be an independent judicial institution. While some favoured an autonomous, independent body, others preferred that the Court form part of the United Nations as, for example, a principal or subsidiary organ. It was noted in this regard that the status would be determined or affected by the method of creation selected (for instance, the International Tribunal for the Former Yugoslavia was established as a subsidiary organ under Security Council resolutions 808 (1993) and 827 (1993)).

3. It was suggested that the Court should be a full-time, permanent institution, which would sit on a continuous basis for the purpose of prosecuting individuals accused of committing serious crimes. In their view, this would promote stability and uniformity in jurisprudence and continuous development of the law. Others, however, favoured a permanent court, which would meet only when a complaint was actually submitted to it, as proposed in article 4 of the International Law Commission draft statute.

4. It was suggested that the Court should possess international legal personality with treaty-making capacity. There was also a suggestion that the Court should be given competence to request advisory opinions from the International Court of Justice. Others pointed out that this would entail legal implications requiring further consideration.

5. It was suggested that the Court could function at least initially as provided for in articles 4 and 5 of the draft statute. The Presidency, the Prosecutor's office and the Registry (and perhaps one judge for the conduct of the investigation and indictment phase) could be of a standing nature, while the Trial or Appeals Chambers would be convened as required. This system was regarded as sufficiently balanced, at least for the initial functioning of the Court, and would not result in needless costs.

6. As concerns the method for establishing the Court, various suggestions were made: an amendment to the Charter of the United Nations making the Court a principal organ of the Organization similar to the International Court of Justice; a resolution adopted by the General Assembly and/or the Security Council; or the conclusion of a multilateral treaty. The first approach was considered ideal, in that it would make the statute an integral part of the Charter with binding effect on all Member States. It was, however, noted that this process would be complex and time-consuming. To set up the Court by a resolution of the General Assembly or of the Security Council as a principal or subsidiary organ thereof was considered efficient, time-saving and feasible pursuant to the advisory opinion of the International Court of Justice of 1954. It was, however, questioned whether a resolution of a recommendatory nature would provide the necessary legal force for the operation of the Court. There was also support for the establishment of the Court under a Security Council resolution. It was, however, pointed out that the Council's competence under the Charter to create ad hoc tribunals in response to a particular situation endangering international peace and security should be distinguished from the current endeavour of creating an International Criminal Court with general powers and competence.

7. To establish the Court by a multilateral treaty, as recommended by the International Law Commission, seemed to enjoy general support, as the treaty could provide the necessary independence and authority for the Court. States would have the choice of becoming parties to the treaty. The treaty could contain the Court's statute and other instruments relevant to its creation and work (e.g. rules of the court, instruments relating to privileges and immunities of the court). In order to promote wider acceptance of the instrument, the General Assembly could adopt a resolution urging States to become parties to the treaty; the treaty itself could also provide for a review or an amendment mechanism and provisions for the settlement of disputes, which could, according to some, serve as an additional means to attract favourable consideration of the Court from States.

8. In order to maintain the treaty as an integral whole, a suggestion was made that the instrument should not permit reservations; others thought that this question might have to be reviewed at a later stage.

9. Different views were expressed on the number of ratifications required to bring the treaty into force, ranging from 25 to 90 ratifications. A relatively high number of ratifications would promote, according to some, the representation of the principal legal systems of the world and the idea of universality of the Court. On the other hand, the advantage of a lower number was that it could permit a relatively early entry into force of the treaty. Still others suggested that a balance should be achieved to avoid too high a number, which could possibly delay the entry into force of the treaty, or too low a number, which would not provide an effective basis for the Court. Some stressed, however, that early establishment of the Court be given more weight than the other considerations, and that a low number of ratifications would not necessarily preclude the requirement of geographical representation and representation of the major legal systems.

2. Relationship between the Court and the United Nations

10. A close relationship between the Court and the United Nations was considered essential and a necessary link to the universality and standing of the Court, though such a relationship should in no way jeopardize the independence of the Court. A special agreement, either elaborated simultaneously with the statute (as an annex thereto) or at a later stage, to be concluded between the two institutions would be appropriate for the establishment of such a relationship. The agreement should, however, be approved by the States parties to the statute. In this regard, references were made to the United Nations agreement with the International Tribunal for the Law of the Sea.

11. It was further suggested that the general principles and substantive questions (for example, the relationship of the Court with the Security Council) should be dealt in the statute itself. The relationship agreement should deal only with such technical questions of an administrative nature as issues of representation, exchange of information and documentation, or provisions on cooperation between the two organizations. The agreement should be guided by and not be inconsistent with the provisions of the statute.

12. A view was expressed that the Court could have a status analogous to that of a specialized agency. Articles 57 and 63 of the Charter concerning the status of specialized agencies and their cooperation with the United Nations would be relevant in such a case. Others questioned whether such a relationship would be appropriate for the envisaged status of the Court; further careful consideration would be required.

3. Financing of the Court

13. As regards the financing of the Court, a view was expressed that it should be effected from the regular budget of the United Nations as is the case with human rights monitoring bodies, since the Court would be dealing with international concerns, and that its financing should be certain and continuing. Moreover, if States parties were required to finance the Court, some States might be deterred from bringing cases before the Court owing to their financial

situation, or the State in question might not be a party to the treaty. However, another view considered that the independence of the Court required States parties to finance it through their own contributions on the basis of the scale of assessments of the United Nations. It was also noted that States initiating cases, interested States or even the Security Council (if it had referred a case to the Court) could contribute to the financing. The examples of the Universal Postal Union and the Permanent Court of Arbitration were mentioned in this respect. In addition, the Court should also be open to voluntary contributions by States, organizations or even individuals and corporations. Reference was also made to a proposal for the establishment of a fund to be financed by voluntary contributions, as well as collected fines and confiscated assets. As concerns the institutional aspects of financing, it was suggested that a general assembly of the States parties could be held annually to consider administrative and financial issues and approve the budget. There was also a view that the consideration of the question of financing was premature at this stage and should be considered later, after the structure and jurisdiction of the Court had been further clarified. It was suggested that a feasibility study be done so that all possible financing options could be considered. It was pointed out that the Secretary-General had prepared in 1995 certain preliminary estimates concerning the establishment of the Court (A/AC.244/L.2).